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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

FRANK L. SMITH, CICERO J. LINDLEY, HAL W. TROVILLION, WILLIAM J. SMITH, P. H. MOYNIHAN, EDWARD H. WRIGHT, and WILLIAM BURKHARDT, the persons constituting the Illinois Commerce Commission of the State of Illinois, and **OSCAR E. CARLSTROM,** Attorney General of the State of Illinois, Appellants, vs. **ILLINOIS BELL TELEPHONE COMPANY,** a corporation, Appellee.	No. 193. (30,677)
FRANK L. SMITH, CICERO J. LINDLEY, HAL W. TROVILLION, WILLIAM J. SMITH, P. H. MOYNIHAN, EDWARD H. WRIGHT, and WILLIAM BURKHARDT, the persons constituting the Illinois Commerce Commission of the State of Illinois, and **OSCAR E. CARLSTROM,** Attorney General of the State of Illinois, Appellants, vs. **ILLINOIS BELL TELEPHONE COMPANY,** a corporation, Appellee.	No. 670. (31,393)

BRIEF AND ARGUMENT OF APPELLEE.

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BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT OF CASE.

The appeals are from a temporary injunction and a final decree entered by the District Court, after overruling a motion to dismiss filed by the defendants. No answer having been filed, the allegations of the bill of

complaint are admitted to be true and should be fully stated to the court.

The bill of complaint filed June 18, 1924, by the Illinois Bell Telephone Company, appellee herein and hereinafter designated as the Company, sets forth the proceedings which the Company had taken before the Public Utilities Commission of Illinois and its successor, the Illinois Commerce Commission to secure increased rates for its Peoria exchange in the State of Illinois, and the failure of the Commissions to act thereon, which resulted in the confiscation of the Company's property.

As the following allegation of paragraph Seventh of the bill of complaint is admitted, no questions of valuation or of revenues and expenses are presented:

> "That at all the times herein mentioned said plaintiff and its predecessor in ownership of said Peoria exchange, said Central Union Telephone Company, have exercised in the management of said exchange all reasonable economies consistent with adequate and efficient service to its subscribers and patrons; that the net revenues derived by the plaintiff from the operations of said Peoria exchange left available for return, after the payment of operating expenses and taxes, $46,312.45 for the calendar year 1921; that for the following periods the revenues derived from said operations of said property have not been sufficient to pay said operating expenses and taxes, and have not paid any return on the said property of the plaintiff in said exchange, but have left deficits as follows:
>
> For the calendar year 1922, $48,458 deficit.
>
> For the calendar year 1923, $64,953 deficit.
>
> That the plaintiff has been incurring monthly deficits from said operations in said exchange for the several past months of the year 1924, whereby the plaintiff has suffered and continues to suffer great and irreparable loss and damage, and its property has been taken and continues to be taken without due process of law." (Rec., 5.)

The admitted facts showing the failure of the Commission to grant relief to the company against the admitted confiscation of its property are summarized as follows:

On July 22, 1919, the Company filed a schedule of rates with the Public Utilities Commission of Illinois which was made temporarily effective on November 28, 1919, by an order of the Commission in its proceeding designated as case No. 9311. (Rec., 3, 8.)

On the first day of April, 1920, before the Commission had finally disposed of Case No. 9311, the Company filed another schedule with the Commission, designated Schedule 2, to become effective May 1, 1920. The Commission took jurisdiction of this application for a new and different schedule of rates, entered an order April 19, 1920, suspending until August 31, 1920, the effective date of the schedule (Rec., 3), designating the proceeding as Case No. 10426. (Rec., 14.)

On July 31, 1920, the Commission entered an order in the proceeding pending before it, separately designated by it as "Case No. 9311," finally approving rate Schedule 1, which had been temporarily in effect since November 28, 1919. By this order the Commission deals solely with the application made by the Company for Schedule 1, and does not purport to dispose of the application made by the Company for Schedule 2 (Rec., 8-13), which the Commission had previously suspended until August 31, 1920.

After the Commission permanently disposed of the application for approval of Schedule 1, it proceeded with the application for approval of Schedule 2, holding hearings, receiving the Company's evidence and entering orders pertaining solely to such application, all parties entitled thereto under the statutes having notice and participating in said proceeding. (Rec., 3, 14, 15.)

On October 31, 1921, the Commission entered an order permanently suspending Schedule 2. (Rec., 14.)

The Company appealed from this order, as provided by statute, to the Circuit Court of Peoria County, which on April 6, 1922, reversed the Commission's order and remanded the case to the Commission for further proceedings. (Rec., 4.)

Pursuant to the mandate of the Circuit Court, this application for Schedule 2 was redocketed with the Commission, the Commission again took jurisdiction of it, held hearings in June and July of 1922, and received additional evidence in support of Schedule 2. (Rec., 4.)

In September, 1922, the Company moved for a temporary schedule of rates to be made effective on less than 30 days' notice. This motion was denied by an order of the Commission entered September 28, 1922. (Rec., 15.) No further proceedings were had by the Commission. On July 5, 1923, the Company wrote the Commission, calling attention to the date of the last hearing which was continued pending reports by the Commission's accountants and engineers, stating that the Company was losing $4,000 a month on the Peoria exchange, and requesting that the case be set for hearing at as early a date as possible. (Rec., 16.)

On June 18, 1924, the bill of complaint now before the Court was filed; over FOUR YEARS after the filing of the rate schedule, over TWO YEARS after the Circuit Court had reversed the final suspension order of the Commission, A YEAR AND A HALF after the Commission had denied temporary rates, and NEARLY A YEAR after the Company had again requested that the matter be disposed of by the Commission.

A temporary restraining order was issued June 18th by Fitz Henry, district judge (Rec., 26), and an inter-

locutory injunction followed July 30, 1924, on the order of a statutory court (Page, Circuit Judge, Lindley, District Judge, and Judge Fitz Henry) after a motion to dismiss had been filed by the defendants. (Rec., 28.) The motion to dismiss was denied May 6, 1925, and an amended motion (Rec., 30) was denied May 11, 1925, defendants stood by their motion to dismiss and a final decree entered (Rec., 32), which was appealed to this court.

Defendants had appealed to this court from the order granting the interlocutory injunction. (Case No. 193, October Term, 1925.) Upon appellee's moving to dismiss this appeal, on December 14, 1925, the appeal from the final decree (Case No. 670, October Term, 1925) was advanced for hearing with case No. 193, and further consideration of the motion to dismiss postponed until the hearing of the cases on the merits.

All references to the record in this brief are to the pages of the printed record in Case No. 670.

SUMMARY OF ARGUMENT.

I.

Final action by a regulatory State Commission is not a condition precedent to a Federal Court enjoining confiscatory rates; public utilities are not bound to suffer confiscation during the rate-making process.

Banton v. *Belt Line Ry. Corp.*, 268 U. S. 413.

Oklahoma Gas & Electric Co. v. *Corporation Commission of Oklahoma*, 261 U. S. 290.

Prendergast v. *New York Telephone Co.*, 262 U. S. 43.

The cases cited by the appellants are not controlling.

Chicago Railways Company v. *Illinois Commerce Commission*, 277 Fed. 970, 974.

Illinois Constitution 1870, Article III.

II.

Proper proceedings had been instituted by the Company before the Public Utilities Commission of Illinois, and were pending before the Illinois Commerce Commission.

Sections 32, 33, 35, 36, 85, Public Utilities Act, Laws of Illinois, 1913, page 478, Appendix "A" herein.

Section 88, Illinois Commerce Commission Law, Laws of Illinois, 1921, page 753, Appendix "B" herein.

Order of Circuit Court of Peoria County, April 6, 1922. (Rec., 4.)

III.

During the pendency of such proceedings, the Company's property had been confiscated; the Commissions had failed to act or grant any temporary relief.

Bill of Complaint (Rec., 1-16).

Chicago Railways Co. v. *City of Chicago*, 292 Ill. 190.

IV.

The right to make rates is with the Company, and the order of the Commission entered October 31, 1921, permanently suspending the Company's rate schedules, was void.

Illinois Bell Telephone Co. v. *Illinois Commerce Commission*, 304 Ill. 357.

The Commission's power to suspend the rate schedule filed by the Company expired after a period of ten months.

City of Edwardsville v. *Illinois Bell Telephone Co.*, 310 Ill. 618.

Alton Water Company v. *Illinois Commerce Commission*, 279 Fed. 869.

The Company might have made the increased rates effective after ten months, but was prevented by injunction.

Michel v. *Illinois Bell Telephone Co.*, 226 Ill. App. 50.

V.

The final decree of the District Court is in proper form, and should be affirmed.

ARGUMENT.

I.

Under the prior decisions of this Court the District Court should, upon a proper showing, enjoin the continued confiscation of the Company's property caused by the delay in action of the Illinois Commerce Commission. In *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, the opinion of Mr. Justice Holmes stated:

> "Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the supreme court of the state hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. *Springfield Gas & E. Co.* v. *Barker*, 231 Fed. 331, 335. In such a state of facts *Prentis* v. *Atlantic Coast Line Co.* has no application. See *Love* v. *Atchison, T. & S. F. R. Co.*, 107 C. C. A. 403, 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights."

The doctrine of the case as thus announced was followed in *Banton* v. *Belt Line Railway Corp.*, 268 U. S. 413, wherein a rehearing of the case before the Commission had been unduly delayed, and in *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, where the Commission was continuing indefinitely the general investigation.

The bill alleges that in 1920 the Commission refused to set the proceedings for hearing, although requested by the Company (Rec. 3); attempted in 1921 to per-

manently suspend Schedule 2 (Rec. 4, 14); and denied an application for temporary rates in 1922 (Rec. 4, 15); and refused to proceed further in 1923, although the Company then stated to the Commission that it was losing $4,000 a month (Rec. 4, 16).

It is true that the bill does not characterize the action of the Commission as wrongful, unreasonable or arbitrary, but such conclusions are unnecessary as a matter of pleading.

Appellants cite in support of their position that the judicial stage of the proceedings had not been reached at the time of the filing of the bill in this case, the following cases:

Prentis v. *Atlantic Coast Lines*, 211 U. S. 210.

Bacon v. *Rutland*, 232 U. S. 134.

Mellon v. *McCafferty*, 239 U. S. 134.

Wisconsin-Minnesota Light & Power Co. v. *Railroad Commission of Wisconsin*, 267 Fed. 711.

Cumberland Telephone & Telegraph Co. v. *Commission*, 287 Fed. 406.

All of the above cases are distinguishable from the present case on their facts.

The case of *Prentis* v. *Atlantic Coast Lines* arose in a suit to enjoin the Virginia State Corporation Commission from enforcing an order fixing passenger rates alleged to be confiscatory, which rates had not yet been made effective and were subject to legislative action by the Virginia court.

In the case at bar rates complained of by appellee were effective for over four years before the filing of the bill of complaint; in *Oklahoma Gas Co.* v. *Corporation Commission*, 261 U. S. 290, the court said of the *Prentis* case:

> "The companies had made no effort to secure a revision and there had been no present invasion of their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the State."

In *Pacific Telephone Company* v. *Kuykendall*, 265 U. S. 196, the *Prentis* case is distinguished and limited.

All that was decided in *Bacon* v. *Rutland* cited by appellant, was that the Supreme Court of Vermont on appeals in utility cases acted in a judicial and not in a legislative capacity. Illinois Courts have no legislative power.

> *Chicago Railways Co.* v. *Illinois Commerce Commission*, 277 Fed. 970, 974.

In *Mellon* v. *McCafferty*, there was involved the question of the action of the lower court in dismissing the bill of complaint because of the failure of complainant to appeal to administrative tribunals of the state to secure an adjustment of his taxes,

The case of *Wisconsin-Minnesota Light & Power Co.* v. *Railroad Commission*, if a correct decision, must be limited to the peculiar facts then before the court.

In the Wisconsin case it appeared that the Commission was at the time of the filing of the bill functioning as to the determination of the matters complained of. In the present case, on the contrary, it definitely appears from the bill of complaint that the Commission failed to function as it has held no hearing, nor has taken any action (except to deny the Company's application for temporary rates on September 28, 1922) for a period of nearly two years before the filing of the bill. The later decision of this court in *Prendergast* v. *New*

York Telephone Company, 262 U. S. 43, is a clear limitation of any general rule in the Wisconsin case.

All that the case of *Cumberland Telephone & Telegraph Co.* v. *Commission* holds it that the Commission, incident to its power to regulate, may suspend a new schedule for a *reasonable* time. It will be noted that the bill in the *Cumberland* case was filed just a little over a month after the proposed effective date of the rate schedule under consideration in the case. Under the Public Utility Act of Tennessee the Commission was given definite authority to suspend a rate schedule for purposes of investigation for a period of three months, and in case its investigation was not completed within the three months' period, for a further reasonable time necessary for the completion of its investigation. The original three months' period did not expire until October 1, or until after the date of the opinion. In our case, instead of the month's delay of the Commission, there had been a delay of over four years, and instead of suit being brought within the ten months allowed the Illinois Commission as a period of suspension, the bill was filed over three years after the permissible period of suspension had expired.

II.

Apart from the federal question of confiscation raised by the bill of complaint, the record shows that the final decree of the District Court could be affirmed under the provisions of the Illinois statutes.

Under Section 36 of the Public Utilities Law, as construed by the Supreme Court of the State of Illinois, a public utility has the primary power to fix its rates, and the power of the Commission to suspend a rate schedule

filed by the utility is limited to ten months beyond the effective date. Upon the expiration of the ten months' period, the Company may charge the rates named in the schedule.

"An examination of section 36 of the act, however, is sufficient to disclose that the commission has no authority to make rates in the first instance, but a schedule of rates, where the rates are desired to be changed, is to be filed with the commission by the utility, and it is only where the commission, after a hearing, finds that the proposed schedule of rates, charges, etc., is not just and reasonable that it becomes the duty of the commission to fix rates."

* * *

Illinois Bell Telephone Co. v. *Commerce Commission ex rel. City of Edwardsville,* 304 Ill. 357, 360.

"Section 36 of the Public Utilities act provides that all rates or charges not suspended by the commission shall, on the expiration of thirty days from the date of filing, or such lesser time as the commission may grant, go into effect and be the established and effective rates or charges, subject to the power of the commission, after a hearing had upon its own motion or upon complaint, to alter or modify the same. The right of the public utility to fix its rates, subject to the power of the commission to suspend or alter them, is recognized. The power of the commission to suspend is limited to one hundred and twenty days beyond the time when the rate or charge would otherwise go into effect, unless the commission, in its discretion, extends the period of suspension for a further period not exceeding six months. That time having expired the rates are legally in effect, subject to the power of the commission to alter or change them. The commission may still establish just and reasonable rates, but until that is done the company may charge the rates named in the schedule."

City of Edwardsville v. *Illinois Bell Telephone Co.,* 310 Ill. 618, 622.

See also

Alton Water Company v. *Illinois Commerce Commission,* 279 Fed. 869, 872.

The Company, having the right to make the increased rates in Schedule 2 effective under the Illinois law, and having actually made these rates effective under the temporary restraining order and interlocutory injunction in the present proceedings (Rec., 26, 28), it was entitled to a final decree enjoining the defendants from compelling the Company to continue in effect the lower rates in Rate Schedule 1. The final decree could be affirmed upon this basis, irrespective of any question of confiscation.

Counsel for appellant admit the construction of the Illinois statute, but endeavor to contend that because the Company did not make its rates effective after the lapse of the suspension period, it could not institute this proceeding to protect its property from confiscation. This is a surprising statement from counsel for the appellant, who well know the following facts which appear in the reports and records of the Illinois courts:

The Company had served notice upon the Commission and the City of Peoria that it would make the rates effective from August 27, 1921, under a decision of the Circuit Court of Sangamon County. It was enjoined from so doing by the City of Peoria on November 1, 1921, and the temporary injunction secured by the City was affirmed by the Appellate Court. *Michel* v. *Illinois Bell Telephone Company,* 226 Ill. App. 50. After this decision the Supreme Court of Illinois in the case last cited (*City of Edwardsville* v. *Illinois Bell Telephone Company,* 310 Ill. 618) construed Section 36 of the Illinois statute contrary to the decision of the Appellate Court, but the Circuit Court of Peoria County, (although it had previously re-

versed the final suspension order of the Commission (Rec,. 4)) refused to follow the decision of the Supreme Court of Illinois, apparently believing that the decision of the Appellate Court on an appeal from an interlocutory order constituted the "law of the case." *The Circuit court entered a final decree permanently enjoining the Company from charging the increased rates in schedule No. 2,* "except upon the authority or finding of the Illinois Commerce Commission that such rates are justified or reasonable pursuant to the Statute in such case made and provided, or except upon the authority or order of a court of competent jurisdiction." (Appendix C, pp. 30-37.) As this decree, entered May 26, 1924, did not prevent the Company from proceeding in the Federal Court, the present suit was instituted. The injunction granted by the Federal Court had the effect of releasing the Company from the injunction of the Circuit Court and enabled the Company to put the increased rates into effect. (Note 1.)

IV.

Opposing Counsel's principal contention is that the Company has not exhausted its legislative remedy. This contention is based upon the fact that the Company's application to the Commission for the latter's authority to

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NOTE 1:—

It is also of interest in this connection to note that the Company attempted to secure an injunction against the Illinois Commerce Commission in the State Courts so that it could make rates effective in a situation similar to that in Peoria, but a demurrer to the bill was sustained and upheld by the Appellate Court. *Illinois Bell Telephone Company* v. *Illinois Commerce Commission*, 227 Ill. App. 23. And by the Supreme Court, *Illinois Bell Telephone Company* v. *Commerce Commission*, 306 Ill. 109. Counsel for the City of Peoria, who are of counsel in the case at bar, appeared in the Appellate Court as *amici curiae*.

change the rates in Schedule 1 to those proposed in Schedule 2, was made to the Commission before the Commission had authorized the rates in Schedule 1. The way to ascertain whether the Company has exhausted its legislative remedy is to first find out what its legislative remedy is and then what it did toward attempting to assert that remedy.

The legislative remedy is contained in the Public Utilities Act of 1913. Section 32 of that Act prohibits unjust rates. Section 33 provides the Company shall file with the Commission and keep open for public inspection all rates charged by it. Section 35 provides no service shall be rendered unless or until the rates have been filed and published as therein provided. Section 36 provides no rates shall be changed except after thirty days' notice to the Commission and to the public, which shall be given by filing the rates with the Commission, keeping them open for public inspection and publication in a newspaper. This section also provides *"whenever"* there shall be filed with the Commission any schedule, the Commission shall have power to enter upon a hearing concerning the propriety thereof and pending such hearing may suspend the proposed rate. This section also provides that *on such hearing* the Commission *shall establish the rate so filed with it or others in lieu thereof which it shall find to be just and reasonable.* (Appendix I, post.)

It is to be seen therefore that when the Company desired to change its rates, its legislative remedy was to proceed in the manner provided by Section 36 of the Act. Opposing counsel do not contend that the Company did not file with the Commission Schedule 2 and give the notice required by Section 36. It did so file Schedule 2, making the change in its rates; it did give the notice required by that section; the Commission acting in the

very manner provided for when a utility seeks a change in its rates, did suspend the proposed rate and did enter upon hearings as to its propriety. At these hearings evidence was introduced in support of the proposed change in rates and finally an order was entered by the Commission dealing solely with this proposed change in rates by which the Commission permanently suspended the rate and refused to grant its approval of the same.

At that point the Company had exhausted the only legislative remedy provided for it by the Illinois Statute to procure a change of existing rates. However, the Company went further. It applied for a rehearing and this application was denied. It even went further and appealed from the order of the Commission entered Oct. 31, 1921 permanently suspending the rate Schedule 2 to the Circuit Court of Peoria County as provided for in the statute. The Circuit Court reversed the order of the Commission and remanded the case to the Commission, "for further proceedings therein." (Rec., 4.) This decision bound the Commission to proceed irrespective of any possible technical defect in the filed schedules. Two additional hearings were then held at which further evidence was introduced by the Company. But notwithstanding the mandate of the Circuit Court that the Commission proceed to fix just and reasonable rates upon the application which the Company had made to it, the Company's request for temporary relief was denied. The Supreme Court of Illinois had decided that the Commission could grant temporary relief pending final disposition of a rate proceeding. *Chicago Railways Co.* v. *City of Chicago*, 292 Ill. 190, 202. The Company's request for the closing of the proceedings was disregarded. It was only at this point that the Company resorted to a Federal Court of Equity for the purpose of asserting its constitutional rights.

The argument of opposing counsel is based entirely upon their mere assertion that the Company had no right to make application to the Commission for a change in rates while there was still pending before the Commission a former application for change in rates. The court is cited to no part of the statute which prohibits a utility from proceeding in such a manner, and none can be found for the statute contains no such prohibition. On the contrary Section 36 expressly provides that *"whenever"* there shall be filed with the Commission any schedule, the Commission shall have power to suspend such rate pending an investigation as to its propriety. *When, on the first day of April,* 1920, *the Company filed Schedule* 2 *with the Commission, it brought itself within the provisions of Section* 36 providing that *"whenever"* a schedule was filed with the Commission it had power to suspend it and investigate its propriety.

That the Company was asserting its legislative remedy by so filing Schedule 2, *was recognized by the Commission itself* when, acting under the authority granted it in Section 36, it suspended the schedule before it disposed of Schedule 1, treating it as a separate and independent proceeding, in no way connected with the application for Schedule 1. The Commission having finally disposed of Schedule 1 by its order of July 31, 1920, thereafter continued to investigate, by formal hearings, the propriety of Schedule 2.

What is the reasoning underlying the decisions requiring a utility to exhaust its legislative remedy before asserting its legal remedy? *It is solely that the State may have a reasonable opportunity to grant relief before resort is made to the courts.* The State is given a reasonable opportunity to grant relief when the facts showing confiscation are presented to the Agency of the State

created for the purpose of investigating and acting upon such facts, in the manner provided by the statutes.

The State, by its counsel appearing in this court, admits facts showing that the rates in effect were confiscatory. The State cannot now be heard to say that it did not have an opportunity to investigate the facts creating such confiscation when it admits (as it does by its motion to dismiss) that the proposed change in rates was filed with it strictly in accordance with the provisions of Section 36 of the Act, and its Commission acting under the authority granted by such section, suspended said proposed rates, *entered upon an investigation as to their propriety, and arrived at a conclusion, expressed in its final order of October* 31, 1921, *suspending permanently Schedule* 2, *that such rates should not be authorized.*

We submit with confidence that the Statutes of Illinois and the decisions of the courts will be searched in vain for any denial, expressed or implied, of the power of the Commission to entertain plaintiff's application for Schedule 2, investigate its propriety and arrive at a conclusion as to whether the proposed rates were just and reasonable, while there was pending at the same time the proceeding involving Schedule 1.

The bill alleges in the usual phraseology of rate schedules that a schedule was filed April 1, 1920, *effective* May 1, 1920, designated as quoted in the bill, "Illinois Public Utilities Commission No. 2, cancelling Illinois Public Utilities Commission No. 1." (Rec., 3.) Counsel seek to play with the word "cancelling" used in the schedule, but a moment's thought demonstrates that no schedule cancels a prior schedule on file until the later filed schedule becomes effective, and when it does become effective it must cancel the prior schedule. Schedule No. 2 never became effective under an order of the Commission, so Schedule No. 1 was never canceled.

We cannot follow the argument of counsel based upon Section 67 of the Illinois statute relative to rehearings. When the permanent suspension order of October 1, 1921, was entered by the Commission, a petition for rehearing was filed by the Company, denied, and the order reversed upon appeal.

When the Commission entered its final order in case No. 9311 (Rec., 8-13), on July 31, 1920, it had entered an order on April 19, 1920, suspending until August 29, 1920, the effective date of the schedules filed in case 10426 (Rec., 3), and had previously put into effect on Nov. 28, 1919, the schedules involved in Case 9311. The Company's losses were constantly increasing, a return of $46,000 in 1921 becoming a deficit of $48,000 in 1922. (Rec., 20.)

The Company expended $1,600,000 in net additions to its property in Peoria from July 1, 1919, to December 31, 1923, doubling the value of its investment (Rec., 5) and losing over $100,000 on its operations in 1922 and 1923 with continued losses in 1924, and without any return on its original or increased plant.

Confident perhaps of eventual relief, but knowing that no process of law could afford recoupment of its losses, the Company continued to fulfill its obligations to its subscribers and carry out the traditions of the Bell System.

V.

The final decree very properly provided "that this decree shall be in full force and effect until such time as the rates of the plaintiff are altered or amended according to law by proceedings not inconsistent with this decree." (Rec., 33.) The rates were and are still subject to a proper order of the Illinois Commerce Commission.

Since a proceeding to enjoin confiscation is *quasi in rem*, the form of the decree very properly enjoined all persons as well as the Commission and its legal representative from interfering with the order of the Court. *Pacific Telephone & Telegraph Co.* v. *Star Publishing Co.*, 2 Fed. (2d series) 151. No proceedings could have been instituted by any subscriber against the Company contrary to the decree entered by the District Court.

CONCLUSION.

In *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18, the court said, with reference to the regulation of public service corporations:

> "It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part."

We venture to suggest that the record now before the Court shows not only a lack of justice, but a complete failure on the part of the regulating body to perform its proper function.

The appeal in case 193 should be dismissed, with costs, for the reasons stated in the Company's motion. Moreover, the interlocutory injunction was properly issued within the discretion of the statutory court.

As to the appeal from the final decree, the defendants admit confiscation of the property of the Company, and before the District Court did not attempt to deny by answer the facts stated in the bill. They now

attempt to nullify the proper relief granted the Company by the District Court by attacking the form of proceedings instituted by the Company before the Commission, and the form of the final decree entered by the District Court. The technical objections are not well taken, and the final decree of the District Court in case 670 should be affirmed, with costs.

On the next succeeding pages we append for the convenience of the court a chronological statement of the various acts and proceedings of the courts and Commissions.

Respectfully submitted,

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WILLIAM D. BANGS,
Solicitors for Illinois Bell Telephone Company.

CHARLES M. BRACELEN,
Of Counsel.

February 20, 1926.

SUMMARY OF PROCEEDINGS.

July 22, 1919—Schedule 1 filed with Public Utilities Commission.

November 28, 1919—Schedule 1 made effective by Commission pending final hearing.

April 1, 1920—Schedule 2 filed, effective May 1, 1920.

April 19, 1920—Schedule 2 suspended by Commission until August 29, 1920.

July 28, 1920—Schedule 2 resuspended by Commission until February 26, 1921.

July 31, 1920—Final order of Commission approving Schedule 1.

November 12-13, 1920—Hearing before Commission on Schedule 2.

December 3, 1920—Hearing before Commission on Schedule 2.

February 23, 1921—Schedule 2 resuspended by Commission until August 26, 1921.

July 1, 1921—Illinois Commerce Commission succeeded Public Utilities Commission of Illinois.

July 28, 1921—Illinois Commerce Commission resuspended Schedule 2 to February 23, 1922.

October 31, 1921—Order entered permanently suspending Schedule 2.

November 1, 1921—Company enjoined by Circuit Court of Peoria County from making Schedule 2 effective.

December 2, 1921—Company applied to Commission for a rehearing on order of October 31, 1921.

December 20, 1921—Rehearing denied.

April 6, 1922—Circuit Court of Peoria County reversed Commission and remanded cause to it for further proceedings therein.

June 6, 1922—Hearing before Commission, after redocketing.

July 6, 1922—Hearing before Commission.

August 5, 1922—Appellate Court affirmed interlocutory injunction issued by Circuit Court of Peoria County, restraining Company from making Schedule 2 effective (*Michel* v. *Illinois Bell Tel. Co.*, 226 Ill. App. 50.).

September 13, 1922—Hearing before Commission.

September 16, 1922—Company filed with Commission written motion for temporary schedule of rates.

September 28, 1922—Commission denied Company's motion for temporary rates.

July 5, 1923—Company asked Commission in writing to set cause for hearing and determination, pointing out deficits in operation.

December 19, 1923—Supreme Court of Illinois held Commission cannot suspend rate schedule for period longer than 10 months, and Company may charge the rates thereafter. (*Edwardsville* v. *Illinois Bell Tel. Co.*, 310 Ill. 618.)

May 26, 1924—Circuit Court of Peoria County permanently enjoined Company from making Schedule 2 effective except upon authority or order of court of competent jurisdiction. (See Appendix C, p. 30.)

June 18, 1924—Bill of Complaint filed in United States District Court for Southern District of Illinois, Southern Division.

APPENDIX A.

"(Section 32) **GENERAL DUTIES OF PUBLIC UTILITIES.** All rates or other charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or for any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. * * *"

Laws of Illinois, 1913, p. 476.

"(Section 33) **FILING SCHEDULE OF RATES.** Every public utility shall file with the commission and shall print and keep open to public inspection schedules showing all rates and other charges, and classifications, which are in force at the time for any product or commodity furnished or to be furnished by it, or for any service performed by it, or for any service in connection therewith, or performed by any public utility controlled or operated by it. Every public utility shall file with and as a part of such schedule and shall state separately all rules, regulations, terminal, icing, storage or other charges, privileges and contracts that in any manner affect the rates charged or to be charged for any service. Such schedule shall be filed for all services performed wholly or partly within this State, and the rates and other charges and classifications shall not, without the consent of the commission, exceed those in effect on July 1, 1913. But nothing in this section shall prevent the commission from approving or fixing rates or other

charges or classifications from time to time, in excess of or less than those shown by said schedules. * * *"

Laws of Illinois, 1913, p. 476.

"(Section 35) **NO SERVICE TO BE RENDERED UNTIL SCHEDULES FILED.** No public utility shall undertake to perform any service or to furnish any product or commodity unless or until the rates and other charges and classifications, rules and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this act: *Provided,* that in cases of emergency, a service, product or commodity not specifically covered by the schedules filed, may be performed or furnished at a reasonable rate, which rate shall forthwith be filed and shall be subject to review in accordance with the provisions of this Act."

Public Utilities Act, Laws of Illinois, 1913, p. 478.

"(Section 36) **CHANGES OF RATES.** Unless the commission otherwise orders, no change shall be made by any public utility in any rate or other charge or classification, or in any rule, regulation, practice or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, except after thirty days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules or supplements stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take

effect, and the manner in which they shall be filed and published. When any change is proposed in any rate or other charge, or classification, or in any rule, regulation, practice, or contract relating to or affecting any rate or other charge, classification or service, or in any privilege or facility, such proposed changes shall be plainly indicated on the new schedule filed with the commission, by some character to be designated by the commission, immediately preceding or following the item.

No public utility shall increase any rate or other charge, or so alter any classification, contract, practice, rule or regulation as to result in any increase in any rate or other charge, under any circumstances whatsoever, except upon a showing before the commission and a finding by the commission that such increase is justified.

Whenever there shall be filed with the commission any schedule stating an individual or joint rate or other charge, classification, contract, practice, rule or regulation, the commission shall have power, and it is hereby given authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleadings by the interested public utility or utilities, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate or other charge, classification, contract, practice, rule or regulation, and pending the hearing and the decision thereon, such rate or other charge, classification, contract, practice, rule or regulation shall not go into effect: Provided, that the period of suspension of such rate or other charge, classification, contract, practice, rule or regulation shall not extend more than one hundred and twenty days beyond the time when such rate or other charge, classification, contract, practice, rule or regulation would other-

wise go into effect unless the commission, in its discretion, extends the period of suspension for a further period not exceeding six months. On such hearing the commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable. All such rates or other charges, classifications, contracts, practices, rules or regulations not so suspended shall, on the expiration of thirty days from the time of filing the same with the commission, or of such lesser time as the commission may grant, go into effect and be the established and effective rates or other charges, classifications, contracts, practices, rules and regulations, subject to the power of the commission, after a hearing had on its own motion or upon complaint, as herein provided, to alter or modify the same. Within thirty days after such changes have been authorized by the commission, copies of the new or revised schedules shall be posted or filed in accordance with the terms of section 34 of this Act, in such a manner that all changes shall be plainly indicated."

Laws of Illinois, 1913, p. 478; Revised Statutes, Illinois, Hurd, 1913, Chapter 111a, Section 36.

"(Section 85) **TECHNICAL OMISSIONS NOT TO INVALIDATE ACTS OF COMMISSION.** A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the acts, orders, decisions, rules and regulations of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

Laws of Illinois, 1913, p. 502.

APPENDIX B.

"(Section 88) This act shall not affect pending actions or proceedings, civil or criminal, in any court, brought by or against the People of the State of Illinois or the Board of Railroad and Warehouse Commissioners, State Public Utilities Commission, or Public Utilities Commission, or by any other person, firm or corporation under the provisions of the Acts establishing or conferring power on the Board of Railroad and Warehouse Commissioners, State Public Utilities Commission or Public Utilities Commission, nor abate any causes of action arising thereunder, but the same may be instituted, prosecuted and defended with the same effect as though this Act had not been passed. Any investigation, hearing or proceeding, instituted or conducted by the Board of Railroad and Warehouse Commissioners, State Public Utilities Commission or Public Utilities Commission, prior to the taking effect of this Act shall be conducted and continued to a final determination by the Illinois Commerce Commission with the same effect as if this Act had not been passed."

Laws of Illinois, 1921, p. 753.

APPENDIX C.

IN THE CIRCUIT COURT,
To the May Term, A. D. 1924.

STATE OF ILLINOIS,
COUNTY OF PEORIA. } ss.

Victor P. Michel, as Mayor of the City of Peoria, Illinois, and Joseph E. Daily,
Complainants,
vs.
Illinois Bell Telephone Company, corporation,
Defendant.

FINAL DECREE.

And now this day this cause coming on to be heard upon the bill of complaint filed by the complainants herein, the answer of the defendant filed thereto, and the replication of the complainants filed to said answer; and this court having heretofore issued a temporary injunction against the defendant herein in accordance with the prayer of said bill of complaint; and the defendant having thereafter filed its motion for a dissolution of said temporary injunction, which said motion was denied; and the defendant having prayed and perfected an appeal to the Appellate Court of the Second District of Illinois from the said order denying motion to dissolve said temporary injunction but which said order of this court was affirmed by said Appellate Court on said appeal. And now this cause coming on for further hearing, and the defendant having filed a motion praying dis-

missal of the bill of complaint herein for want of equity, which said motion has been denied by this court, and all of the parties being now present in court and represented by counsel, and a stipulation of facts having been entered into between the interested parties, and the said cause coming on to be heard upon the said bill of complaint and answer and replication and the stipulation of facts of the parties, and the court having heard the arguments of counsel and now being fuly advised in the premises, upon consideration thereof, doth find as follows:

First. That the complainants, Victor P. Michel and Joseph E. Daily, were on the date the bill of complaint was filed herein, prior thereto and since date, and still are, subscribers to the service of the Illinois Bell Telephone Company in the City of Peoria, County of Peoria, and State of Illinois, and each of them, together with approximately nineteen thousand other subscribers, are affected by the proposed increase of rates referred to in said bill of complaint.

Second. That on, to-wit, the date of the filing of said bill, prior thereto and since said date the defendant, Illinois Bell Telephone Company, was a public utilities corporation, engaged in the furnishing of telephonic communication between its subscribers in the City of Peoria, County of Peoria, State of Illinois, and elsewhere; that said defendant was on, to-wit, the date said bill was filed and ever since said date, operating its telephone business under the jurisdiction of the Illinois Commerce Commission of the State of Illinois, and the Statute of said State, entitled "an act concerning public utilities" in force July 1st, 1921, and that prior to July 1st, 1921, said business was carried on by the said defendant and its assignor, the Central Union Telephone Company, under the jurisdiction of the Public Utilities Commission of the State of Illinois, and under the provisions of the Statute

of said State, entitled "an act to provide for the regulation of public utilities," approved June 30th, 1913, and in force January 1st, 1914, and amendments thereto.

Third. That at the time of the filing of said bill of complaint herein and prior thereto, the defendant was lawfully, with the approval of the Illinois Public Utilities Commission, predecessor of the Illinois Commerce Commission, charging and collecting from its subscribers in said City of Peoria, for telephone service rendered, rates for its service as follows, to-wit:

Single Business	$6.00 per month
Two Party Business	5.00 per month
Rural Business	2.75 per month
Single Residence	3.25 per month
Two Party Residence	2.50 per month
Four Party Residence	2.25 per month
Rural Residence	2.00 per month

That on November 1st, 1921, the defendant notified the complainant, Victor P. Michel, as Mayor of said City of Peoria, that it was the intention of said defendant to increase said rates before that time charged, as above set forth, as charged in said bill of complaint, in accordance with the written notice, a copy of which is set forth in said bill of complaint, and that the said defendant intended to and would have, had it not been prevented from so doing by the injunction issued by the court in this cause, increased said rates to the complainants and its other subscribers as set forth in its said notice to the said Mayor aforesaid.

Fourth. That a comparative schedule of rates in force at the time of the filing of their bill, and the proposed increased rates are as follows:

	Old Rates	New Rates
Single Business	$6.00	$8.00
Two-party Business	5.00	6.75
Rural Business	2.75	4.00
Single Residence	3.25	4.00

Two-party Residence	2.50	3.25
Four-party Residence	2.25	2.50
Rural Residence	2.00	2.50

Fifth. That the history of the proceedings had and taken by the defendant, Illinois Bell Telephone Company and its assignor predecessor, Central Union Telephone Company, with reference to putting of said increased rates into effect is as follows:

That on or about the 1st day of April, A. D. 1920, the Central Union Telephone Company filed with the Public Utilities Commission of the State of Illinois, the proposed increased schedule of rates above in this stipulation set forth, for telephone service applying to all subscribers in the Cities of Peoria, Averyville, Bartonville, East Peoria and Peoria Heights, in the State of Illinois, the same to be effective May 1st, 1920.

Sixth. That said schedule of rates so filed was designated in the office of the Commission as I. P. U. C. No. 2, and provided for an increase of and over, and was designed to increase, the rates then and theretofore in existence of all subscribers of the telephones in the said several cities above mentioned.

Seventh. That said Telephone Company gave due notice to all persons affected by said proposed schedule of rates, and filed the same with the Commission, and kept the same open for public inspection, and in all respects complied with the statutes for the filing of rates, as in such case made and provided.

Eighth. That on, to-wit, the 9th day of April, 1920, said Public Utilities Commission entered an order in said cause suspending the effective date of said rate schedule to a later date, to-wit: August 29th, 1920, and that on July 28, 1920, said Public Utilities Commission entered a further order in said cause again suspending

the effective date of said rate schedule until February 26, 1921, and that on, to-wit: February 23, 1921, said Public Utilities Commission entered a further order again suspending the effective date of said rate schedule until August 26, 1921, and that on the 28th day of July, 1921, the Illinois Commerce Commission, as successor to the Public Utilities Commission prior to the Public Utilities Act of 1921, entered an order in said cause again suspending the effective date of said rate schedule until the 23rd day of February, 1922, and that on or about the 31st day of October, 1921, said Illinois Commerce Commission entered a further order in said cause, and served the same upon the defendant after November 1, 1921, permanently suspending, annulling and canceling said rate schedule so filed by Central Union Telephone Company on April 1, 1920, and designated as I. P. U. C. No. 2.

Ninth. That on or about the 23d day of December, 1920, the defendant herein, Illinois Bell Telephone Company, a corporation duly organized under the laws of the State of Illinois, by due and proper assignment, transfer and delivery, and by and with the authority and approval of the Public Utilities Commission of the State of Illinois, and in the manner as in the Statute and By-laws was provided, became the full and complete owner of all of the property, rights and privileges of the said Central Union Telephone Company, including the telephone exchange in and about the Cities of Peoria, Averyville, Bartchville, East Peoria and Peoria Heights, in the State of Illinois, and that the said Illinois Bell Telephone Company, the defendant has since that time been, and is now, the owner of said property, rights and privileges formerly owned and enjoyed by the said Central Union Telephone Company and subject to its duties and obligations in connection therewith, and that said de-

fendant, Illinois Bell Telephone Company has ever since that time been, and is now operating said telephone exchange.

Tenth. That on or about December 2, 1921, said defendant filed with the Illinois Commerce Commission an application for rehearing upon said rate schedule I. P. U. C. No. 2, which said application was on December 30, 1921, denied by said Commission.

Eleventh. That on or about December 31, 1921, said defendant filed notice of appeal from the order of the Commission denying said application for rehearing, which said appeal was taken to the Circuit Court of Peoria County, Illinois, and upon the hearing thereof was on April 6, 1922, by said Circuit Court reversed and remanded to said Illinois Commerce Commission for further hearing, with the right of all parties to the proceedings to introduce further evidence if they cared to do so, and for such further proceelings and final determination as may be proper, a certified record of said proceedings in said Circuit Court being duly returned to said Illinois Commerce Commission on or about April 6, 1922.

Twelfth. That on various dates thereafter, to-wit: Commencing June 6, 1922, and ending, to-wit: September 28, 1922, various hearings and proceedings were had under said rate schedule, the said Telephone Company introducing further evidence, the evidence on behalf of said Company being closed on said last mentioned date. The City of Peoria, as defendant to said proceedings, through its corporation counsel, advised the chairman of said Illinois Commerce Commission who presided at said hearing that the City of Peoria had not the means with which to employ engineers and other experts to make an inspection and valuation of the physical property, books and records of the said Company used by

it in connection with the rendition of its service in the said City of Peoria and then and there requested that said Illinois Commerce Commission through its proper officers, agents, auditors, engineers, etc., make an inspection and examination of all the physical properties and records used by said defendant in connection with the operation of its said telephone exchange in the said City of Peoria, Illinois, for the purpose of making an appraisal and report with reference to the value of said physical properties and the operation thereof, for rate making purposes to be introduced as evidence on the part of the said City of Peoria in this cause, and further requested of said Commission that the hearings in said cause be continued until such time as such Illinois Commerce Commission through its proper officers and agents had made the necessary examination and check as aforesaid of said properties of the defendant. Both of said requests made by the City of Peoria as aforesaid were allowed by said Illinois Commerce Commission and no hearings have been had since said date pending the completion of said inspection of said properties by said Illinois Commerce Commission as aforesaid; and that said cause is now pending before said Illinois Commerce Commission under the circumstances as above set forth.

Thirteenth. That on, to-wit: September 28, 1922, a motion by the said Illinois Bell Telephone Company asking the Commission to grant temporary increased rates was denied.

Fourteenth. That neither the Illinois Commerce Commission nor its predecessor, the Illinois Public Utilities Commission, has ever at any time up to and including the date of the entry of this decree made any finding in the above proceeding or any proceeding that such proposed increased rates in said stipulation referred to were justified or reasonable and that neither said Illinois Commerce Commission or said Public Utilities

Commission approved such proposed increased rates or allowed them to be put into force and effect; and that the cause by which the defendant, Illinois Bell Telephone Company, sought to put them into effect as hereinabove set forth, which was instituted before the Illinois Public Utilities Commission by the filing of such schedule of said proposed increased rates on the 1st day of April, A. D. 1920, is still pending before the Illinois Commerce Commission as above herein set forth.

It is, Therefore, Ordered, Adjudged and Decreed by the Court that the temporary injunction heretofore entered herein be and the same is hereby decreed to be made permanent in that the defendant herein, its agents, servants and attorneys, be and they are hereby restrained and enjoined from collecting or attempting to collect the rates, or any of them set out in the said schedule of rates and designated as new rates in said I. P. U. C. No. 2, except upon the authority or finding of the Illinois Commerce Commission that such rates are justified or reasonable pursuant to the Statute in such case made and provided, or except upon the authority or order of a court of competent jurisdiction.

It is Further Ordered, Adjudged and Decreed by the Court that the defendant pay all the costs of this suit.

And the defendant hereby excepts to the entry of the decree herein and prays an appeal to the Appellate Court of the Second District of the State of Illinois, which said appeal is allowed upon the filing in this court within thirty days hereof a certificate of evidence and a bond in the sum of Five Hundred Dollars, with surety to be approved by the court.

Dated at Peoria, Illinois, this 26th day of May, A. D. 1924.

(Signed) John M. Niehaus
Judge.

STATE OF ILLINOIS, } ss. No. 3370.
COUNTY OF PEORIA. }

IN THE CIRCUIT COURT OF THE COUNTY OF PEORIA,
STATE OF ILLINOIS.

I, George Sturch, Clerk of the Circuit Court, in and for said County of Peoria and State of Illinois, and the Keeper of the Records and Seal of said Court, do hereby certify that I have compared the foregoing copy of a certain decree filed on the 26th day of May, A. D. 1924, and entered in Chancery Record C-F on page 80 in a cause wherein Victor P. Michel as Mayor of the City of Peoria, Illinois, and Joseph E. Daily are complainants and Illinois Bell Telephone Company, a corporation, is defendant, with the original record thereof remaining in my office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and the official seal, at Peoria, this 17th day of February, A. D. 1926.

(Signed) GEORGE STURCH,
(Seal) *Clerk of the Circuit Court.*